6-1-2016

State v. Lutton Appellant's Brief Dckt. 43257

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, PLAINTIFF-RESPONDENT vs. LAWRENCE R. LUTTON DEFENDANT-APPELLANT	Supreme Court No. 43257 Boise County District Court No. Cr-2014-1131

OPENING BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BOISE

HONORABLE PATRICK H. OWEN
District Judge

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A. Nature of the Case

This is an appeal from the district court's order withholding judgment entered following Appellant Lawrence Lutton's conditional guilty plea, by which he reserved his right to appeal the district court's denial of his motion to suppress. R. 103-110.

B. General Course of Proceedings

On May 23, 2014, Mr. Lutton and his two sons (a four-year-old and a two-year old) went to Arrowrock Reservoir to enjoy a day of fishing and playing in the water with two friends and their children. Exhibit A,[1] 10:48-12:00, 20:38-23:00, 21:35-21:50; Tr. p. 89, ln. 5-20. At about 9:00 p.m., the friend drove Mr. Lutton to his two-wheel drive vehicle and Mr. Lutton followed his friend down the windy dirt road towards the highway. Exhibit A, 12:12-12:25; Tr. p. 89, ln. 21 – p. 90, ln. 1.

As Mr. Lutton traveled about a quarter mile behind his friend to avoid the worst of the dust, he hit washboard and lost control of his vehicle, which left the road and fell into the reservoir. Exhibit A, 12:09-12:34;19:48-20:00; Tr. p. 90, ln. 2-9. Mr. Lutton escaped the submerging vehicle and rescued his four-year-old son. Tr. p. 90, ln. 10-15. The four-year-old was not breathing when he was removed from the water and the friend revived him with CPR. Exhibit A, 12:34-13:13. Meanwhile, Mr.

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1 Exhibit A is an audio recording of a Boise City Police Officer's interactions with Mr. Lutton and his friend. The Idaho State Police trooper who actually seized Mr. Lutton's blood failed to record his interactions with Mr. Lutton.

Lutton lost his two-year-old son after unbuckling him from his seat and spent the next half hour or more diving into the cold water trying to find him. Exhibit A, 12:34-13:40; Tr. p. 38, ln. 24 – p. 39, ln. 7; p. 90, ln. 15-21. The friend and others who had stopped to help eventually forced Mr. Lutton out of the water and convinced him that he and the four-year-old needed treatment for hypothermia. Exhibit A, 13:04-13:30, 20:00-21:00, 22:40-23:00; Tr. p. 90, ln. 19-24.

The friend drove Mr. Lutton and his four-year-old towards Saint Luke's Hospital in Boise while others on the scene continued to search for the two-year old. Tr. p. 39, ln. 12-15; p. 90, ln. 3-11. Two Boise City Police officers observed the friend driving west on Warm Springs Avenue at a high rate of speed with the vehicle's hazard lights flashing. Tr. p. 34, ln. 17 – p. 36, ln. 1; p. 66, ln. 1-12. The officers stopped the friend's vehicle and one officer approached Mr. Lutton in the passenger seat while the second contacted the friend in the driver's seat. Tr. p. 36, ln. 2 – p. 37, ln. 3.

The officer who spoke with Mr. Lutton at the passenger window detected the "slight odor of intoxicating beverage coming from the vehicle" as she spoke with Mr. Lutton. Tr. p. 37 ln. 4-6; p. 46, ln. 21 – p. 47, ln. 4. Mr. Lutton informed the officer that he had consumed three beers between one and three o'clock that afternoon and the driver also admitted drinking earlier in the day. Tr. p. 37, ln. 10-12; p. 51, ln. 5-19. The officers called an ambulance to transport Mr. Lutton and his four-year-old child to the hospital and, since the accident occurred in Boise County, asked

dispatch to send an Idaho State Police trooper to the hospital in order to investigate whether Mr. Lutton had been driving under the influence. Tr. p. 40, ln. 3 – p. 41, ln. 2; p. 50, ln. 2-11.

The second officer interviewed Mr. Lutton in the ambulance and noted that he was unable to smell any alcohol on his person. Tr. p. 67, ln. 1 – p. 68, ln. 2; p. 69, ln. 17 – p. 70, ln. 7. The officers remained on the scene and interviewed Mr. Lutton's friend about the accident before traveling to the hospital. Exhibit A, 10:48-13:40; Tr. p. 70, ln. 13-22.

The officers then went to the emergency room ("ER") and entered Mr. Lutton's treatment room as he emotionally related to the friends at his bedside that he "couldn't find [his two-year-old son] anywhere." Exhibit A, 18:40-19:10; Tr. p. 41, ln. 16 – p. 42, ln. 4; p. 70, ln. 20-25. The officer told Mr. Lutton's friends that she needed to talk to Mr. Lutton and was "going to have you guys here leave." Exhibit A, 19:10-19:40.

The officer spent "quite a bit of time" speaking directly with Mr. Lutton, who was naked except for a blanket, in the small hospital ER treatment room about his activities earlier in the day and the accident. Tr. p. 19, ln. 7-14; p. 42, ln. 15-21; p. 49, ln. 2-21; p. 71, ln. 1-6; p. 84, ln. 15-19. Mr. Lutton explained that he drank three cans of beer between 1:00 p.m. and 3:00 p.m. Exhibit A, 20:50-21:40. The officer neither detected the odor of alcohol on Mr. Lutton nor noticed any indication that

Mr. Lutton was impaired or intoxicated. Tr. p. 42, ln. 15-21; p. 49, ln. 2-21, p. 52, ln. 3-5.

The officer explained to Mr. Lutton that an Idaho State Police trooper was en route to read him a form and take his blood. Exhibit A, 22:00-22:15. According to the officer, she did not conduct the standardized field sobriety tests ("FSTs") herself because "we were waiting for ISP at that point. We were turning [the DUI investigation] over to them. Tr. p. 50, ln. 8-22; p. 59, ln. 7-20. The officer told Mr. Lutton that since he had admitted drinking and there were injuries, the officer would read a form to take blood and "then we will get a phlebotomist in here." Exhibit A, 22-10-22:30; Tr. p. 55, ln. 20-25. The trooper arrived and the city officer briefed him, including telling him that she smelled alcohol on the friend. Tr. p. 16, ln. 1-7; p. 31, ln. 13-22; p. 43, ln. 3-11. The city officers then posted themselves just outside Mr. Lutton's room. Tr. p. 43, ln. 12-25; p. 80, ln. 1-17.

Hospital staff entered the room to obtain verbal consent for medical treatment and Mr. Lutton's permission for he and his four-year-old son to have visitors. Exhibit A, 23:30-24:15. Another employee told Mr. Lutton that his sister had arrived to see him and while she knew he could not have visitors at the moment, inquired whether Mr. Lutton wanted visitors when the officer was "done." Tr. p. 24:20-25:00.

The trooper briefly interviewed Mr. Lutton about the accident and his drinking earlier in the day before reading the ALS advisory form. Exhibit A, 26:11-

26:30. The trooper was trained to conduct FSTs but did not "investigate a DUI." Tr. p. 10, ln. 4 – p. 12, ln. 15; p. 17, ln. 24 – p. 18, ln. 1. Instead, the trooper relied on someone else as to whether there was probable cause to believe Mr. Lutton was impaired, trusted "the officers on scene that had made that call already" and believed he was being dispatched solely to obtain the blood sample. Tr. p. 12, ln. 9 – p. 13, ln. 5; p. 18, ln. 6 – p. 19, ln. 6; p. 28, ln. 9-12. The trooper told Mr. Lutton that he "would have to submit to a blood test" because he admitted to drinking and there had been a significant accident. Tr. p. 21, ln. 2-6. Mr. Lutton remained in the room with the trooper for about thirty to forty-five minutes before a nurse arrived to draw his blood. Tr. p. 22, ln. 5-7.

Before the blood draw, a gurney carrying Mr. Lutton's two-year old child passed in the hallway in front of Mr. Lutton with a trauma team working on him. Tr. p. 8, ln. 6-12; p. 22, ln. 20 – p. 23, ln. 3; p. 57, ln. 7-23. Mr. Lutton became distraught as his child was wheeled by and began to cry. Tr. p. 23, ln. 4-8. Mr. Lutton wanted to see his son and the trooper told him that he would get Mr. Lutton to his son "as soon as we can." Tr. p. 23, ln. 16-24. The child was placed in the adjoining room, which was divided from Mr. Lutton by a transparent partition. Tr. p. 6, ln. 14-21.

The hospital chaplain followed the two-year-old to the treatment room and noticed Mr. Lutton, who was wrapped in a blanket in the adjacent room, become "very, very" upset and start crying when his child passed on the gurney. Tr. p. 79,

ln. 9 – p. 80, ln. 1. Tr. p. 80, ln. 1-9. The chaplain observed the trooper inside Mr. Lutton's room and the two officers posted outside. Tr. p. 80, ln. 12-21. The chaplain believed Mr. Lutton was being detained by police and thus did not attempt to take him to the two-year-old at that time. Tr. p. 82, ln. 16-21. The chaplain instead went to the four-year-old's room and checked in with the friends and family there. Tr. p. 82, ln. 22-25.

"Total chaos" followed the child's arrival in the adjoining room. Tr. p. 8, ln. 15-18; p. 19, 17-18; p. 32, ln. 1-19; p. 57, ln. 7-10. While the trooper testified that he did not deny Mr. Lutton permission to go to his child, the trooper was uncertain whether he actually poked his head out of the room to get permission for Mr. Lutton to go to his child or whether he asked one of the other officers. Tr. p. 32, ln. 1-13. The trooper clarified that believed he did "something" in effort to obtain permission for Mr. Lutton but had no specific recollection as to exactly what he did. Tr. p. 32, ln. 13-25. The trooper also did not know whether he told Mr. Lutton "he's fine; they're taking care of him; you have to do the blood draw first." Tr. p. 25, ln. 2-4.

As the trauma team treated his two-year-old son in the adjacent room, the trooper informed Mr. Lutton "you need to give blood" to which Mr. Lutton responded "okay." Tr. p. 25, ln. 8-14. After the police obtained Mr. Lutton's blood, the chaplain returned to the room, got Mr. Lutton dressed and took him to see his sons. Tr. p. 84, ln. 15 – p. 85, ln. 20. The two-year-old later succumbed to his injuries. *See* R. 15-16.

The laboratory analysis indicated that Mr. Lutton's blood alcohol concentration was .092 and the state charged him with vehicular manslaughter and DUI. R. 15-16. Mr. Lutton moved to suppress the blood test results, arguing that the blood draw was not justified by any recognized exception to the warrant requirement and violated his constitutional right to be free from unreasonable searches and seizures. R. 26-36. Following a hearing, the state argued the blood draw was authorized by consent and probable cause. R. 43-49.

The district court found probable cause that Mr. Lutton had committed vehicular manslaughter based on his admission to drinking three beers nine to twelve hours before the accident; the officer's detection of the odor of alcohol emanating from the vehicle; and the officers' knowledge Mr. Lutton lost control of his vehicle and crashed into the reservoir, which could possibly result in a fatality. R. 70-71. The district court further found that Mr. Lutton did not resist the blood draw and, thus, did not revoke his implied consent. R. 73-74. The district court thus denied Mr. Lutton's motion to suppress. R. 75. Mr. Lutton moved to reconsider, noting the district court's findings were unsupported by the evidence and it had erroneously concluded that consent authorized the seizure. R. 77-89.

Mr. Lutton thereafter pled guilty, reserving his right to appeal the denial of his motion to suppress. R. 78-80, 90-91. The district court withheld judgment and placed Mr. Lutton on unsupervised probation for four years. R. 103-106. This appeal follows.

III. ISSUE PRESENTED ON APPEAL

1. Did the district court error in denying motion to suppress?

IV. ARGUMENT

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. An evidentiary test measuring blood alcohol content ("BAC test") is a search and seizure under the Fourth Amendment to the United States Constitution and Article I, Section 17 of the Idaho Constitution. *Schmerber v. California*, 384 U.S. 757, 767 (1966); *State v. Wulff*, 157 Idaho 416, 418, 337 P.3d 575, 577 (2014). Just as with other warrantless seizures, a warrantless BAC test violates these state and federal constitutional guarantees unless the state establishes application of a well-recognized exception to the warrant requirement by a preponderance of the evidence. *Missouri v. McNeely*, 133 S.Ct. 1552, 1558 (2013); *Wulff*, 157 Idaho at 419, 337 P.3d at 578. Under *McNeely*, Idaho can neither treat exigency based upon the natural dissipation of alcohol in the bloodstream nor the implied consent statute as per se exceptions to the warrant requirement. *Wulff*, 157 Idaho at 419-20, 337 P.3d at 578-79.

Here, the district court found that police lawfully seized Mr. Lutton's blood pursuant to Idaho's implied consent statute. However, an Idaho driver implicitly consents to a BAC test only where police have reasonable grounds to believe he or she is driving under the influence. Here, neither the city officers nor the trooper conducted a DUI investigation as each agency believed the other was responsible to

do so. The available facts – no signs of impairment, no alcoholic odor on Mr. Lutton's *person*, and Mr. Lutton's admission to drinking three beers more than nine hours before an accident – fall well short of forming the requisite level of cause. Even if police had reasonable grounds to request an evidentiary test, any consent was no longer voluntary at the time Mr. Lutton's blood was seized.

Accordingly, the district court erred in concluding that implied consent justified the blood draw and in denying Mr. Lutton's motion to suppress. This Court should therefore vacate the district court's order withholding judgment and allow Mr. Lutton to withdraw his guilty plea.

A. Standard of Review

On appeal from a motion to suppress, this Court accepts the trial court's findings of fact if supported by substantial evidence, while freely reviewing the application of constitutional principles to the facts as found. *State v. Case*, 159 Idaho 546, 363 P.3d 868, 870-71 (Ct. App. 2015); *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). The reasonableness of a given search or seizure is a question of law requiring this Court's independent review. *State v. Aguirre*, 141 Idaho 560, 562, 112 P.3d 848, 850 (Ct. App. 2005); *State v. Parkinson*, 135 Idaho 357, 360, 17 P.3d 301, 304 (Ct. App. 2000).

B. Idaho's Implied Consent Statute Did Not Justify the Blood Draw Because the Trooper Lacked Reasonable Grounds to Believe Mr. Lutton Drove Under the Influence

Idaho Code § 18–8002(1) provides that a motorist who operates a vehicle in

Idaho implicitly consents to evidentiary testing, provided that the police officer has "reasonable grounds" to believe the motorist is intoxicated. *Wulff*, 157 Idaho at 419, 337 P.3d at 578; *Wernecke v. State, Idaho Transp. Dep't*, 158 Idaho 654, 658, 350 P.3d 1031, 1035 (Ct. App. 2015), *review denied* (July 2, 2015). "Reasonable grounds" is not defined by statute and the Idaho Court of Appeals has interpreted Idaho Supreme Court precedent as unclear as to whether an officer needs probable cause to have "reasonable grounds" to request the BAC test. *State v. Nicolescu*, 156 Idaho 287, 290, 323 P.3d 1248, 1251 (Ct. App. 2014).

Nevertheless, cases in which the appellate court found "reasonable grounds" include evidence of intoxication beyond the circumstances present in this case. For instance, in *Wernecke*, the officer detected a *strong* odor of alcohol and observed that the driver's eyes were glassy and bloodshot, that he had slurred speech and an impaired memory. *Wernecke*, 158 Idaho at 659, 350 P.3d at 1036. The driver also failed the horizontal gaze nystagmus test, repeatedly failed to follow the officer's instructions as he administered the test and admitted he consumed alcohol earlier that evening. *Id.* These circumstances provided the police officer with legal cause to believe the driver had been under the influence of alcohol and to administer BAC test. *Id.; see also State v. Diaz*, 144 Idaho 300, 302-03, 160 P.3d 739, 741-42 (2007) *overruled on other grounds by Wulff* (reasonable grounds to suspect that defendant was driving under the influence included erratic driving, bloodshot and glassy eyes, and slurred speech); *State v. Orr*, 157 Idaho 206, 209, 335 P.3d 51, 54 (Ct. App.

2014) (defendant properly detained on suspicion of driving under the influence where officer found defendant in the driver's seat of his vehicle; was unable to wake defendant by knocking on the vehicle window; ultimately shook the defendant in order to rouse him; observed slurred speech, glassy and bloodshot eyes, and breath smelling of alcohol; and noted the defendant had impaired memory and poor judgment); *Nicolescu,* 156 Idaho at 291, 323 P.3d at 1252 (reasonable grounds to administer BAC test because officer questioning the defendant detected a strong odor of an alcoholic beverage; observed that his eyes were red, bloodshot, and watery; and the defendant informed the officer that he had been consuming alcohol earlier that evening); *In re Suspension of Driver's License of Gibbar*, 143 Idaho 937, 943-44, 155 P.3d 1176, 1182-83 (Ct. App. 2006) (reasonable grounds where driver was weaving, officer smelled alcohol inside vehicle and on his person, defendant's eyes were blood shot and the defendant admitted to drinking two beers after initially denying any consumption of alcohol).

Conversely, in the instant case, no officer noted that Mr. Lutton had bloodshot eyes, impaired memory, or other indication of intoxication. As noted by the district court, Mr. Lutton "understood and responded to questioning at the hospital." R. 74. The city officers did not conduct a DUI investigation at the traffic stop because Mr. Lutton and his four-year-old son needed medical attention. They did not conduct FSTs at the hospital because they believed they were turning their investigation over to the ISP trooper. The trooper, on the other hand, understood his

sole purpose was to obtain the blood sample and believed other officers had already conducted the investigation. In short, unlike cases where a driver's admission to minimal drinking was coupled with signs of impairment, Mr. Lutton's presentation was entirely consistent with his statement that he had stopped drinking more than six hours before the accident.

In finding probable cause, the district court considered that one city officer smelled alcohol when she first contacted Mr. Lutton at the passenger window of the friend's vehicle. R. 70. However, neither officer smelled alcohol on Mr. Lutton's *person* – either in the confined space of the ambulance minutes later or during direct interaction in the small ER treatment room. Unlike a situation in which the *suspect* provides innocent explanations for suspicious circumstances, the officers own observations established that the "slight" odor the officer detected at the window must have come from the passenger who admitted drinking. *Cf. State v. Danney*, 153 Idaho 405, 411, 283 P.3d 722, 728 (2012) (the existence of alternative innocent explanations does not necessarily negate reasonable suspicion).

The sole grounds to believe Mr. Lutton could have been under the influence at the time of the accident was his statement he had three beers more than nine hours before the accident and the fact he lost control on a dirt road's washboard surface. Those facts do not establish reasonable grounds without evidence of actual impairment.

The district court noted that the officers knew Mr. Lutton had lost control "of his vehicle which crashed into the reservoir, and that there was reason to believe that there would be a fatality." R. 70. However, the seriousness of the potential offense does not lower the standard needed to find reasonable grounds to ask a driver to submit to a BAC test.[2]

Nor does the bare existence of an accident equate a driving pattern evidencing impairment. The friend informed officers that Mr. Lutton was driving his two-wheel drive vehicle about a quarter of a mile behind the friend to avoid the dust when the friend saw Mr. Lutton's headlights leave the road. Exhibit A, 20:20. Mr. Lutton told the officers that he lost control on washboard, overcorrected and went off the road. Exhibit A, 20:30. That Mr. Lutton lost control on a narrow dirt road after hitting washboard while driving a two-wheel drive vehicle at dusk certainly does not establish reasonable grounds to believe he was driving intoxicated, even if driving off an ordinary road could in itself establish impairment.[3]

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2 Conversely, the offense's seriousness is relevant to whether exigent circumstances justified a warrantless blood draw. The state did not present any evidence that exigent circumstances justified the failure to obtain a warrant in this case.

3 The particular stretch of road on which Mr. Lutton lost control is notorious for its treacherous nature. On June 22, 2015, the Idaho Statesman reported an accident involving "the 10th person to have died since 2009 after running off Arrowrock Road, which narrows into a windy, rutted dirt road about 5 miles east of Idaho 21." http://www.idahostatesman.com/news/local/article40865439.html#storylink=cpy. The articles noted that the "body was found less than a mile east of the site where a car went off the road and into the reservoir in May 2014, resulting in the eventual

Neither the city officers nor the trooper conducted a DUI investigation and the circumstances fall well short of establishing reasonable grounds to request a BAC test. Accordingly, the implicit consent statute cannot justify the blood draw and the district court should have suppressed its results as fruit of the poisonous tree.

C. Even if the BAC Request was Supported by Reasonable Grounds, Mr. Lutton Did Not Continue to Provide Voluntary Consent to the Blood Draw and the Search and Seizure Cannot Be Upheld Based on Implied Consent

Implied consent is no longer acceptable when it operates as a per se exception to the warrant requirement. *Wulff*, 157 Idaho at 421, 337 P.3d at 580. Thus, implied consent may justify a warrantless blood draw only when (1) the driver gave his or her initial consent voluntarily, and (2) the driver continued to give voluntary consent at the time of evidentiary testing. *State v. Rios*, No. 43017, 2016 WL 1638043, at *2 (Idaho Apr. 26, 2016); *Wulff*, 157 Idaho 423, 337 P.3d 575, 337 P.3d at 582. A defendant's refusal, protest or objection to the BAC test terminates the implied consent given under Idaho's implied consent statute. *Rios*, No. 43017, 2016 WL 1638043, at *2; *State v. Eversole*, No. 43277, 2016 WL 1296185, at *5 (Apr. 4, 2016); *State v. Smith*, 159 Idaho 15, 26, 355 P.3d 644, 655 (Ct. App. 2015), *rev. denied* (Aug. 18, 2015).

Here, the district court erroneously concluded that Mr. Lutton had to

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death of' Mr. Lutton's 2-year-old son. *Id.* "Most recently, a Boise couple . . . died on Valentine's Day [2015] when their car plunged into Arrowrock Reservoir. *Id.*

unequivocally revoke implied consent and incorrectly equated Mr. Lutton's acquiescence to the trooper's indication he "needed to give blood" with voluntary consent. Mr. Lutton had suffered both emotional and physical trauma and Mr. Lutton could not have visitors until the officers were finished. At the time of the actual blood draw, Mr. Lutton was distraught as a trauma team worked on his two-year-old in plain view and he was told to wait before going to his son. The totality of these circumstances establish that Mr. Lutton's capacity for self-determination was critically impaired and that he no longer voluntarily consented to the test at the time his blood was seized. The district court therefore erred in denying Mr. Lutton's motion to suppress.

1. The district court failed to consider whether the totality of the circumstances established that Mr. Lutton continued to voluntarily consent to the blood draw

The district court reasoned "it is clear that the driver must unequivocally, based upon the totality of the circumstances, demonstrate that he or she is withdrawing the implied consent provided by statute" and that "the evidence is clear that that Lutton did not affirmatively object, refuse or physically resist the request for blood draw." R. 72, 74. However, rather than requiring a suspect to "unequivocally" revoke consent, the "standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness' — what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Rios*, No. 43017, 2016 WL 1638043, at *2, *citing Florida v.*

Jimeno, 500 U.S. 248, 251 (1991).

Here, the city officers arrived in Mr. Lutton's treatment room and evicted his friends. Exhibit A, 18:45-19:40. After Mr. Lutton answered the officer's questions, a nurse let him know his sister had arrived to see him and inquired whether he wanted visitors once the officer was finished. Exhibit A, 24:20-25. Mr. Lutton indicated that he did. *Id.* Both the city officer and the trooper informed Mr. Lutton that his blood would be seized because there had been a significant accident and he had been drinking. Tr. p. 21, ln. 2-6; p. 55, ln. 20-25. Before the blood draw, Mr. Lutton's two-year-old son arrived gravely injured and a trauma team treated him in plain view. Mr. Lutton asked to see his son and the trooper told him to wait. The officer then told Mr. Lutton "you need to give blood." Tr. p. 25, ln. 8-14.

The typical person in such a situation would have understood that he was obligated to have his blood drawn and that he would be allowed to see his sons and friends once that blood draw was complete. Mr. Lutton no longer voluntarily consented when his blood was taken regardless of whether the trooper used the word "mandatory" or expressly told Mr. Lutton he could not see his son until the blood draw.

Moreover, the Idaho Supreme Court "has never stated that verbal or physical resistance was required to withdraw implied consent." *Rios*, No. 43017, 2016 WL 1638043, at *3. Mere acquiescence to a claim of authority by a law enforcement officer does not constitute consent. *Bumper v. North Carolina*, 391 U.S. 543, 549, 88

S.Ct. 1788, 1792, 20 L.Ed.2d 797, 802–03 (1968); *Sims v. State*, 159 Idaho 249, 358 P.3d 810, 816 (Ct. App. 2015), *review denied* (Nov. 4, 2015).

That Mr. Lutton was cooperative and did not say "no" to the blood draw fails to establish that he continued to voluntarily consent to the blood draw. Instead, especially given Mr. Lutton's extreme vulnerability and the coercive circumstances, his lack of resistance establishes mere acquiescence, not voluntary consent. *See also State v. Jaborra*, 143 Idaho 94, 98, 137 P.3d 481, 485 (Ct. App. 2006) (defendant's nod in response to the request for permission to open the box was evidence only of consent, not proof of its voluntariness, and such minimal affirmative gestures may indicate mere acquiescence); *State v. Zapp*, 108 Idaho 723, 726, 701 P.2d 671, 674 (Ct. App. 1985) (defendant detained in coercive atmosphere when searched and in such circumstances mere acquiescence, such as a shrug of the shoulders or a minimal affirmative gesture, does not constitute consent under the Fourth Amendment).

Mr. Lutton was not required to unequivocally revoke his implied consent or expressly refuse the blood draw by saying "no." Rather, the issue is whether the totality of the circumstances establish that Mr. Lutton continued to voluntarily consent to the BAC test at the time his blood was taken.

2. Mr. Lutton's characteristics and the circumstances surrounding the blood draw fail to establish voluntary consent

"Where the validity of a search rests on consent," the state must prove "that the necessary consent was obtained and that it was freely and voluntarily given."

Rios, No. 43017, 2016 WL 1638043, at *2, *citing Florida v. Royer,* 460 U.S. 491, 497 (1983). Courts assess "the totality of all the surrounding circumstances — both the characteristics of the accused and the details of the interrogation" to determine whether a subject's will was overborne in a particular case. *Jaborra,* 143 Idaho at 97, 137 P.3d at 484, *citing Schneckloth v. Bustamonte,* 412 U.S. 218, 226 (1973). This factual determination must account for subtly coercive police questions and the possibly vulnerable subjective condition of the party giving consent. *Jaborra,* 143 Idaho at 97, 137 P.3d at 484. Supreme Court decisions determining whether a suspect's consent was voluntary or coerced "each reflected a careful scrutiny of all the surrounding circumstances" and "none of them turned on the presence or absence of a single controlling criterion." *Wulff,* 157 Idaho at 422, 337 P.3d at 581 *citing Schneckloth,* 412 at 226.

Officers found Mr. Lutton covered only by a blanket in an ER treatment room waiting with his friends for news of his two-year old who had been submerged in the water for more than thirty minutes. The officers evicted Mr. Lutton's friends, and informed Mr. Lutton that a trooper would arrive to read him a form and take his blood. After the trooper arrived, the other two officers posted themselves at the door. Tr. p. 20, ln. 2-22. Hospital staff confirmed that he wanted visitors once officers were finished and he was allowed. Exhibit A, 23:40-25:00.

Shortly before the blood draw, a gurney carrying Mr. Lutton's two-year old child passed in the hallway and entered the adjoining room, which was divided by a

transparent partition. Tr. p. 8, ln. 6-16; p. 22, ln. 20 – p. 23, ln. 3. Mr. Lutton became distraught[4] as his child was wheeled by and began to cry. Tr. p. 23, ln. 4-8 Tr. p. 80, ln. 1-9. He wanted to see his son and the trooper told him that he would get him to his son "as soon as we can." Tr. p. 23, ln. 16-24.

It is hard to imagine circumstances more likely to evoke a vulnerable emotional condition and to interfere with the capacity for self-determination than those encountered by Mr. Lutton. Mr. Lutton did not voluntarily consent to the blood draw and the district court should have granted the motion to suppress.

3. The circumstances described in the officers' testimony would have communicated to the typical reasonable person that the blood draw was obligatory and needed to be complete before Mr. Lutton could see his sons, family and friends

The district court indicated that it did not find Mr. Lutton credible when "he testified that he was told that he could not refuse and that the blood draw was mandatory" or when he testified "he was told repeatedly that that he could not see his son unless he provided a blood sample." R. 74. The district court indicated it instead credited the trooper's testimony on those points. *Id.*

Nonetheless, the typical person in Mr. Lawrence's situation – as described in the *trooper's* testimony and the testimony of the other two officers – would have

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4 Relying on the audio recording of the city officer's contact with Mr. Lutton at the hospital, the district court found that: "while [Mr. Lutton] was certainly and understandably upset and concerned throughout, [he] was in much better condition at the hospital than he was at the time of the traffic stop." R. 74. Whatever Mr. Lutton's emotional state when speaking with the city officers, the trooper and the chaplain both described Mr. Lutton as distraught and crying when his two-year-old

believed the blood test was mandatory and that he could see his sons and have other visitors after the trooper had obtained his blood.

While the trooper denied saying the word "mandatory" in reference to the blood draw, he also did not ask whether Mr. Lutton consented. Tr. p. 25, ln. 11-14. Consent is not voluntary if it is "the product of duress or coercion, express *or implied*." *Wulff*, 157 Idaho at 422, 337 P.3d at 581, *citing Schneckloth*, 412 U.S. at 227 (emphasis added). The trooper testified that he told Mr. Lutton that he "would have to submit to a blood test" and "you need to give blood" – phrases communicating that Mr. Lutton's consent was immaterial. Tr. p. 21, ln. 3-6; p. 25, ln. 8-14. A typical person – particularly one in Mr. Lutton's vulnerable state – would have understood he had no choice but to submit to the blood draw.

The only communication that possibly suggested a choice was the ALS advisory, which describes the civil penalty for refusing. The ALS advisory does not communicate that the suspect can decline to cooperate with the officer's direction to submit to a BAC test. Indeed, in the years between *Diaz* and *McNeely*, officers played the advisory notwithstanding the fact that a driver's refusal to provide a breath sample simply resulted in a blood draw, taken with physical force when necessary.

After playing the advisory, the trooper told Mr. Lutton "you need to give blood." Tr. p. 25, ln. 8-14. Mr. Lutton reasonably believed that he was required to

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arrived in the adjacent room before the actual blood draw.

submit to a blood draw. *See also State v. Butler*, 302 P.3d 609, 614 (Arizona 2013) (court did not abuse its discretion in finding consent involuntary where officer read the implied consent admonition verbatim and and in "plain English" before concluding with the statement, "You are, therefore, required to submit to the specified tests").

The circumstances also communicated that Mr. Lutton could not see his son or other family or friends until the blood draw was complete. At the time the gurney carrying Mr. Lutton's two-year old child passed, he had already been told he was not allowed visits from friends or family until the officers were finished with him. *See* Exhibit A, 20:20. According to the trooper, Mr. Lutton was distraught, crying and wanted to go to his son. Tr. p. 23, ln. 4-16. The trooper testified that he told Mr. Lutton that he would get Mr. Lutton to his son "as soon as we can." Tr. p. 23, ln. 16-24.

Indeed, rather than contradict Mr. Lutton's testimony that the trooper told him he had to give blood before seeing his child, the trooper testified that he was *uncertain* whether he told Mr. Lutton "he's fine; they're taking care of him; you have to do the blood draw first." Tr. p. 25, ln. 2-4. And while the trooper denied refusing to allow Mr. Lutton to have contact with his son, he could not recall whether he actually poked his head out of the room to see whether Mr. Lutton could go to his child or whether he asked one of the other officers. Tr. p. 8, ln. 2-5; p. 32, ln. 1-19.

The trooper described the situation as "total chaos" in which he thought he "did something but can't remember what." Tr. p. 32, ln. 14-19.

Further, the pertinent inquiry is not whether the officers subjectively intended to communicate to Mr. Lutton that could not go to his child until he gave blood but, rather, what the typical reasonable person would have understood by the exchange between the officer and Mr. Lutton. While the trooper may have believed that the "call" whether to allow Mr. Lutton to see his son was the hospital's instead of his [Tr. p. 24, ln. 7-15], the evidence establishes that the hospital staff was keeping Mr. Lutton from family and friends because of the police presence. *See* Exhibit A, 18:45-19:30 (officer evicting friends from room), 23:30-24:10 (staff indicating she would finish registration later and confirming he wanted visitors), 24:15-25:00 (second staff informing Mr. Lutton his sister had arrived to see him and confirming he wanted family to visit once the officer was finished); p. 81, ln. 16 – p. 82, ln. 25 (chaplain's testimony that she did not go to Mr. Lutton and unite him with family because she believed he was being "held" by police). It was thus entirely reasonable for Mr. Lutton to believe that he could not go to his sons until the police had finished their investigation by seizing his blood.

The circumstances described in the officers' testimony and reflected on the audio recording establish that Mr. Lutton was informed he could not see friends or family until law enforcement gave permission. The officers further indicated to Mr. Lutton that they would take his blood and that he "needed" to give the officer his

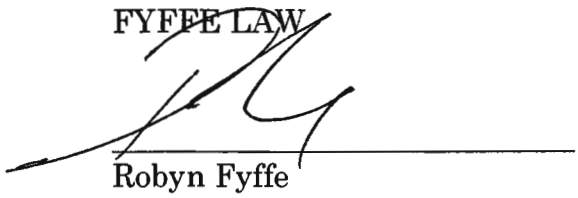
blood. Shortly before the actual blood draw, Mr. Lutton's gravely injured two-year-old arrived and the trooper told Mr. Lutton he had to wait to see him. Particularly in light of Mr. Lutton's extremely vulnerable subjective condition, his cooperation during the blood draw does not establish voluntary consent. The district court erred in finding that Mr. Lutton voluntarily consented to the blood draw.

V. CONCLUSION

The district court erred in determining that the officers had reasonable grounds to believe that Mr. Lutton had been driving under the influence. Even if there were sufficient grounds to request a BAC test, Mr. Lutton did not continue to voluntarily consent at the time his blood was seized. The district court erred in denying the motion to suppress and Mr. Lutton respectfully asks this Court to vacate the district court's order withholding judgment and remand with instruction to allow Mr. Lutton to withdraw his guilty plea.

Respectfully submitted this 1st day of June, 2016.

FYFFE LAW



Robyn Fyffe
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CERTIFICATE OF SERVICE

I CERTIFY that on June 1, 2016, I sent a copy of the foregoing to the Criminal Law Division of the Idaho Attorney General at ecf@ag.idaho.gov

Robyn Fyffe